In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-992

ROBERT WOLLACK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals was rendered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1972. The petition for a writ of certiorari was filed on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUES PRESENTED

1. Whether a conspiracy to violate 26 U.S.C. (1964

ed.) 4705(a) and 7237(b) can be prosecuted subsequent to their repeal when the acts alleged to constitute the conspiracy took place prior to repeal.

2. Whether the sentencing provisions of 26 U.S.C. (1964 ed.) 7237(b) remain in force with respect to violations of 26 U.S.C. (1964 ed.) 4705(a) and 7237(b) taking place prior to repeal of these statutes.

3. Whether a recorded conversation involving petitioner, two attorneys, and a government informer who consented to the recording, was properly admitted into evidence under 18 U.S.C. 2517(3).

4. Whether the district court erred in discharging a juror and substituting an alternate juror when, during the prosecution's case, the juror requested to be excused on the ground that he had reached a verdict and could not continue with an open mind.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate federal narcotics laws, 26 U.S.C. (1964 ed.) 4705(a) and 7237(b), and was sentenced to imprisonment for six years under 26 U.S.C. (1964 ed.) 7237(b). The court of appeals affirmed without opinion.

Prosecution was based on a four-count indictment filed June 22, 1971.[1] Prior to the filing of this indict-

[1] Petitioner's Appendix in the court of appeals (hereafter App.), pp. 7-12. The conspiracy charged was alleged to have existed "[f]rom on or about the 1st day of January, 1970 and continuously thereafter up to and including the date of the filing of this indictment" (App. 10). This indictment superseded one filed on February 26, 1971, which had similarly alleged the existence of a

ment Congress had repealed 26 U.S.C. (1964 ed.) 4705 (a) and 7237(b), effective May 1, 1971.[2] At the beginning of the trial, the government stipulated that it would offer no proof of any events occurring beyond May 1, 1971 (App. 15); no such proof was in fact offered and the court's charge to the jury contained the instruction that "there is no evidence that the conspiracy alleged by the government continued beyond the end of 1970" (App. 43).

The evidence at trial established that during 1970 petitioner, a New York City police officer, had been engaged in the business of selling narcotics at wholesale. Petitioner sold narcotics to Mr. George Hanold, among others; Mr. Hanold on several occasions bought cocaine from petitioner on consignment and distributed it at retail himself, or on some occasions, in partnership with others. Mr. Hanold was arrested on December 16, 1970, and at that time agreed to cooperate with the government as an informer; on December 18, 1970, he was equipped with a recording device and met with petitioner, who took him to the law offices of Kane, Salaway and Finger. The conversation which occurred at that meeting was recorded and subsequently introduced into evidence.[3] The conversation reveals that the purpose of the meeting was to arrange suitable

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conspiracy "up to and including the date of this indictment" (App. 5).

[2] P. L. 91-513, Section 1101(b), 84 Stat. 1292. The successor provisions are found at 21 U.S.C. 801 *et seq.*

[3] The transcript (hereafter App. Tr.) of the recorded conversation, as admitted into evidence, is set out at the end of App. and is separately paginated.

representation for Mr. Hanold in light of his arrest (App. Tr. 4, 25, 27, 29, 30, 31, 33, 37, 38, 46, 49); much of the discussion concerned the circumstances of Mr. Hanold's arrest and arraignment (App. Tr. 3, 5-6, 11, 21, 26). Petitioner's concern during the discussion was not how he personally should be advised legally but rather how he could thwart legitimate investigations and prosecutions of his own criminal activity and that of others (App. Tr. 8, 10, 14-17, 29-30, 33-34, 38, 47). The only "advice" given to petitioner by the attorneys was that his suggestion that a certain alleged informer be killed was "premature" (App. Tr. 17).

During the presentation of the government's case at trial, one of the jurors informed the court that he had reached a verdict and could not continue to hear the evidence in the case with an open mind (App. 19). The juror requested to be excused because he felt he could not be fair (App. 24); the court excused him (App. 26) and appointed an alternate juror to take his place (App. 28).

ARGUMENT

1. Petitioner contends that a conspiracy to violate 26 U.S.C. (1964 ed.) 4705(a) and 7237(b) cannot be prosecuted subsequent to May 1, 1971, the effective date of the repeal of those provisions, even though the acts alleged to constitute the conspiracy all took place prior to that date (Pet. 6-8).[4] This contention has no merit.

[4] Although it is not entirely clear, petitioner's argument may be read as also challenging the sufficiency of the indictment, on the ground that it alleged continuation of the conspiracy beyond the repeal date. However, since the evidence was limited to the period

In repealing Sections 4705(a) and 7237(b), Congress expressly provided that "[p]rosecutions for any violation of law occurring prior to [May 1, 1971] shall not be affected by the repeals or amendments made by [this Act], or abated by reason thereof" (P. L. 91-513, Section 1103(a), 84 Stat. 1294). Furthermore, even in the absence of such a specific saving clause prosecutions could be maintained on the authority of the general statutory saving clause, 1 U.S.C. 109. *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4), certiorari denied, 401 U.S. 942; *United States* v. *Brown*, 429 F. 2d 566 (C.A. 5).

2. Petitioner further contends that the sentencing provisions of 26 U.S.C. (1964 ed.) 7237(b) do not remain in force with respect to violations occurring prior to May 1, 1971, citing *United States* v. *Stephens*, 449 F.2d 103 (C.A. 9), and arguing that even if he was properly prosecuted he should have been sentenced under 21 U.S.C. 841, the successor provision to 26 U.S.C. (1964 ed.) 7237(b) (Pet. 8-9). However, *Stephens* does not support petitioner's contention, for in that case the court did not question a conviction and sentence under 21 U.S.C. (1964 ed.) 176a, which was repealed at the same time as 26 U.S.C. (1964 ed.) 4705(a) and 7237(b),[5] even though the sentence was imposed after the effective date of repeal; the holding in

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of time during which the statutes were still in force and the jury was so instructed, petitioner suffered no prejudice and was properly convicted under the indictment. Cf. *United States* v. *Baker*, 419 F. 2d 88 (C.A. 2), certiorari denied, 397 U.S. 976; *United States* v. *Postma*, 242 F. 2d 488, 497 (on petition for rehearing) (C.A. 2), certiorari denied, 354 U.S. 922.

[5] P. L. 91-513, Section 1101(a), 84 Stat. 1291.

Stephens was that the repeal of 26 U.S.C. (1964 ed.) 7237(d), which had prohibited the granting of probation or of suspended sentences in certain cases involving violations of the narcotics laws, permitted the suspension of that sentence and the release of the defendant on probation, an issue not present in this case. The imposition of a penalty under a sentencing provision should be comprehended within the meaning of the word "prosecutions" in the saving clause expressly provided by Congress in repealing Section 7237(b);* whether it is or not, however, sentencing provisions do clearly come within 1 U.S.C. 109 which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty * * * unless the repealing Act shall so expressly provide." Therefore, the sentencing provision of 26 U.S.C. (1964 ed.) 7237(b) did remain in force for violations, such as that committed by petitioner, occurring prior to May 1, 1971. *United States* v. *Fiotto,* C.A. 2, Nos. 71-1651, 71-1689, 71-1690, decided January 4, 1972, petition for writ of certiorari pending, No. 71-1114, this Term.

3. Petitioner contends that a recorded conversation involving petitioner, two attorneys, and a government informer who consented to the recording, was not admissible into evidence under 18 U.S.C. 2517(3) or, alternatively, that its admission into evidence violated his right to counsel under the Sixth Amendment (Pet. 9-12, 15-17). Petitioner's argument under the statute rests upon the absence of a prior judicial order authorizing interception of the conversation. However, such an order is not required by the statute when one

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* P. L. 91-513, Section 1103(a), 84 Stat. 1294, quoted *supra.*

of the participants to the conversation consents to its recording, 18 U.S.C. 2511(2)(c) and (d); since Mr. Hanold consented in advance to the recording, it was properly admissible into evidence under 18 U.S.C. 2517 (3). See *United States* v. *Puchi*, 441 F. 2d 697, 700 (C.A. 9), certiorari denied, 404 U.S. 853. Introduction into evidence of a recorded transcript under such circumstances did not violate petitioner's Fourth Amendment rights, *United States* v. *White*, 401 U.S. 745, and petitioner does not contend otherwise.

Petitioner seeks to avoid the consequences of *White* by alleging that the participation in the conversation by two attorneys raises a Sixth Amendment bar to its admissibility. This argument is deficient. The transcript of the conversation reveals that it did not involve any attorney-client relationship between petitioner and the two attorneys who were present. The participation by the attorneys was limited to a preliminary consultation with Mr. Hanold, who had been arrested two days previously. Petitioner, who had not been arrested, was not there seeking legal advice; he was present because he was concerned with the consequences to himself which might result from Mr. Hanold's arrest and how they could be avoided, either through Mr. Hanold's legal defense or through extra-legal means. Since no attorney-client relationship was involved between petitioner and the attorneys, and petitioner was not seeking legal assistance for himself, no issue is in fact presented with respect to his right to counsel.[7] Moreover,

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[7] It may be relevant here to note that because of the presence of a third person, and also due to the fact that at the time of and during the conversation the attorneys were not acting in a professional capacity as to petitioner, the common law attorney-client

this Court has never held that pre-accusatory investigations, conducted prior to taking a suspect into custody, constitute a prosecutorial "critical stage" which invokes the Sixth Amendment guarantee of assistance of counsel.

4. Petitioner further contends that the district court erred in discharging a juror and substituting an alternate juror under Rule 24, Fed. R. Crim. P., when, during the prosecution's case, the juror requested to be excused on the ground that he had reached a verdict and could not continue with an open mind (Pet. 12-15). Rule 24(c) provides that "[a]lternate jurors * * * shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." It is not an abuse of the district court's discretion to find a juror who reaches a final conclusion after hearing only part of the evidence to be "unable or disqualified to perform [his] duties" and to dismiss him and replace him with an alternate. See *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868, 873 (C.A. 4). Petitioner has not established that the procedure followed by the district court was prejudicial to him and therefore he is not entitled to a new trial. *United States* v. *Zambito*, 315 F. 2d 266 (C.A. 4), certiorari denied, 373 U.S. 924 (holding that there is no prejudice in "the exclusion of a juror whom [defendant] may or may not have thought biased in his favor"; *id.* at 269).

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privilege would not protect against divulgence of the contents of the conversation even if an attorney-client relationship had existed. See, *e.g.*, *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9), and *Pollock* v. *United States*, 202 F. 2d 281 (C.A. 5).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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